United States Court of Appeals

for the Second Circuit

APPENDIX

75-2139

Original

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

UNITED STATES ex rel.
ORLANDO RODRIGUEZ,

Petitioner-Appellee,

-against-

HAROLD BUTLER, Superintendent,
Wallkill Correctional Facility,
Wallkill, New York,

Respondent-Appellant.

----------X

Docket No. 75-2139

B
P/S

APPENDIX

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent-Appellant
Office & P.O. Address
Two World Trade Center
New York, New York 10047

2

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TABLE OF CONTENTS

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TATES DISTRICT COURT

JUDGE

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Jury demand date:

Form No. 106 Rev.

73 CV. 1207

TITLE OF CASE	ATTORNEYS
U.S.A. ex rel. ORLANDO RODRIGUEZ Petitioner HON HAROLD BUTLER, Superintendent of Wallkill Correctional Facility Respondent	For plaintiff: ORLANDO RODRIGUEZ #10337 P.O. Box G Wallkill, New York 12589 Jesse Berman 351 Broadway-NYC 10013 (431-4600) 10/14 For defendant: Hon. Louis J. Lefkowitz Attorney General State of New York Attn: Iris A. Steel 80 Centre Street New York, N.Y. 10013

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
3. 5 mailed x	Clerk		1/12			
3. 6 mailed	Marshal					
sis of Action: Petition for it of habeas Corpus	Docket fee					
	Witness fees					1
tion arose at:	Depositions					

1/12/73

ONLY COPY AVAILABLE

JUDGE MOTLEY PR-

ex rel Orlando Rodriguez vs. Harold Butler

JUDGE MOTLEY 73 CV. 1207

	PROCEEDINGS	Date Order Judgment No.
-73	Filed Petition for a writ of habeus corpus.	
-73	Filed Order that Petitioner is permitted to proceed in forma pauperis, without prepayment of fees or costs Pierce,J.	
.73	Filed Order that time for respondent to answer the petition is extended up to and including May 3, 1973. Lasker,J. (mn)	
3	Filed affidavit of Iris A. Steel in opposition to petitioner's application for a writ of habeas corpus.	
73	Filed petitioner's reply affidavit (traverse).	
73	Filed Notice of Assignment to JUDGE MOTLEY.	
-73	Filed Respondents memeorandum of law.	
-73	Filed petitioner's answer to respondent's memorandum of law.	
-73	Filed CJA copy 5 appointing Jesse Berman, Esq., 351 Broadway, NYC 10013 as attorney for Orlando Rodrigues. MOTLEY, J.	
6-74	Filed petitioner's memorandum of law.	
74	Filed respondent's memorandum of law.	
-74	Filed petitioner's supplemental memorandum of law.	
.75	PRE-TRIAL CONFERENCE HELD BY ~~HERD BY~~ Lasker, U.S.D.J.	
-75	Filed Opinion No.43126...Petitioner,Orlando Rodriguez,a prisoner in Wallkill Correctional Facility,seaks a writ of habeas corpus to review a judgment of conviction rendered in County Court,Westchester County,Hac. was convicted & sentenced.The Jndgment was unanimously affirmed by the Appellate Div.& leave to appeal to NYCA was denied in 1972.. ...for the reasons stated...The petition of habeas corpus is hereby granted. Petitioner is ordered released from custody unless the state within 60 days from the date of the entry of this court's order retries him.A stay will be granted if respondent files a notice of appeal in timely fashion.MOTLEY,J. (m-n	
30-75	Filed pltff's affdvt. of service by mail (by atty Jesse Berman) of true copy of notice of entry of Opinion upon Louis J. Lefkowitz, Atty. General, State of N.Y. on 9-29-75.	
4-75	Filed Respondents Notice of Appeal to the USCA for the 2nd Circuit form Judge Motley's Opinion filed on 09-25-75 vacating petitioner's judgment of conviction and releasing him from custody etc. (not.EA) mailed notice to: Jesse Berman,Esq.351 Broadway,New York,N.Y.10013.	

2

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk
By _____ Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT NEW YORK

73 CV. 1207

UNITED STATES OF AMERICA EX REL
ORLANDO RODRIGUEZ PETITIONER X

AGAINST

HON.HAROLD BUTLER,SUPERINTENDENT OF
WALLKILL CORRECTIONAL FACILITY. X

RESPONDENT

X

PETITION

Application for a writ of habeus corpus.

STATE OF NEW YORK)
ULSTER COUNTY) SS.:

Orlando Rodriguez,the petitioner in the above entitled action,pro-se,respectfully alleges his contentions: Petitioner invokes this Courts,jurisdiction pursuant to:28 U.S.C 2254,and in particular the Fourth,Fifth,and Fourteenth Amendments,to the Constitution of the United States.

I. Petitioner is a citizen of the United States and is over the age of twenty one (2I) years old.

2. This is the Ist attempt to the U.S.District Court,for an application for a writ in the nature of a writ of Habeus Corpus

3. Petitioner is presently serving a sentence of imprisonment according to the legal transscript(minutes)not to exceed five(5)years,yet his commitment papers state that his sentence is fifteen(I5)years,after a conviction in the Westchester County Supreme Court,for the crime of felonious possession of a dangerous drug in the Ist degree,after Trial,before the Hon. George Beisheim,Jr. and a Jury. Westchester County Clerks Indictment: 39-I969.

4. STATEMENT OF FACTS

Petitioner Orlando Rodriguez,referred to as Orlando Adrian Rodriguez Sierra,in the Trial Minutes,was convicted after a Jury Trial,in the County of Westchester,after being indicted by a Grand Jury,for the crime of Felonious Possession of a Drug,in the Ist Degree,Indictment No: 39-I969. The judgement was rendered on July 20th I970,and was appealed from to the Appellate Division-Second Department,which Affirmed,the conviction with No Opinion.

Description of Order: IO-I8-72 App Div 2d affirmed 7-20-720 Co. Ct.,Westchester County

This Order,was further appealed to the New York State Court of Appeals,and a Certificate Denying Leave,was rendered on November 2nd I972. SEE: EXHIBIT A

Petitioner has exhausted his States Rights,and now comes to this Honorable Court,for relief,due to his unconstitutional conviction,which was obtained in violation of the 4th,5th, 6th,and I4th Amendments to the Constitution of the United States.

5. THE SUPPRESSION HEARING. The facts of the case herein are relatively simple. A perusual thereof,however,reveal that the motion to suppress evidence which was timely made on behalf of the defense,should have been granted. The relevant facts are as follows: Certain members of the Sheriffs Department of Westchester County,as well as an Assistant District Attorney by the name of Lawrence Martin,were investigating a narcotics conspiracy case in Westchester County. During the course of this investigation,your petitioner,Orlando Rodriguez,was seen entering a building,namely 250 North Broadway,Yonkers,New York, carrying a paper bag(ordinary),the contents which were unknown to the surveiling agents. The subject of the surveilance apparently was primarily geared toward one Daniel Gonzalez,who also lived in the same building,but in a different apartment. SEE: Suppression Hearing Minutes:Page II-I3.

On the I4th of January I969,Assistant District Attorney Martin,entered the apartment of Gonzalez,with a search warrant. THIS WAS AN ENTIRELY DIFFERENT APARTMENT FROM THAT OF YOUR PETITIONER RODRIGUEZ,AND THE TWO MUST NOT BE CONFUSED. HEARING MINUTES: Page I5.

Gonzalez and another man were arrested when the authorities entered his apartment. Page I6 Hearing Minutes. One of the Officers,accompanying Martin,Frank Garcia,apparently was used as an interpreter. Suppession Hearing Minutes: Page I7 and I8.

It should be noted here that although Garcia,was deceased,the Court permitted quotation of remarks by Garcia, over vigorous objection of the defense. Suppression Minutes: Page: I9-22.

The authorities had neither an arrest warrant for your petitioner Rodriguez,nor a Search Warrant,for the apartment where he and his wife,along with children,allegedly resided. Suppression Hearing Minutes:Page 23.

No arrest warrant or search warrant was obtained with reference to your petitioner Rodriguez,at any time. The Westchester County District Attorney,frankly admitted that he did not know whether or not Rodriguez,possessed any narcotics.

A telephone conversation heard on wiretap of Gonzalez,phone,were the entire predicate for the arrest and the massive search and seizure of your petitioner Rodriguez,home without a warrant.

THE HUNTLEY HEARING

Investigator Rocco Turso,attached to the Sheriff Office of Westchester County,testified that on January 14th 1969 he arrested the petitioner Rodriguez,in his apartment,2-G,at 250 North Broadway,Yonkers,New York,at about 2 or 3 in the morning. The arrest was for Conspiracy to sell Narcotics. He had no warrant. Turso,asserted that the arrest of petitioner Rodriguez,was at the direction of his Chief,Charles Jackson. SEE: Huntley Minutes: Page 3-5.

Turso,acknowledged that he did not understand spanish. After the arrest the witness declared that Rodriguez was brought to the Yonkers Police Station where he was interrogated by Assistant D.A. Martin,and Investigator Frank Garcia, (Garcia,having died before the trial) Huntley Minutes:Page 8-9.

Turso recalled that he spent aproximatly a half hour in apartment 2-G,of your petitioner. Former D.A. Lawrence Martin,testified for the prosecution at the Huntley Hearing, that Investigator Frank Garcia,was his interpreter and told him that your petitioner wished to speak with him. Martin,however admitted that he could not speak spanish fluently and of course not aware personally of whether the petitioner actually understood certain Miranda Warnings,which were presented on a card, and which Martin,believed were read aloud by petitioner and the interpreter. Huntley Hearing Minutes:Page 23-24.

It should be noted at this juncture that a vehement objection was interposed by the defense attorney,on the grounds that the statements of Garcia,were not subject to cross-examination since he was dead,and that it was error to permit the former District Attorney to reveal what Garcia said concerning alleged statements or activities of Orlando Rodriguez,and it was prejudicial to do so. SEE HUNTLEY MINUTES:Page 24-25-27.

Martin declared that no notes were taken whatsoever with reference to this case,to the best of his recollection,and although I8 months old,his memory was the sole basis for his testimony. Huntley Hearing:Page 38-39.

Petitioners wife was acquitted ,although she was also arrested for possession of narcotics. Your petitioner himself testified at the Hearing,stating that he and his wife had been asleep in bed in the early morning of January I4th I969 when the police burst in....Huntley Hearing:Page 62-65.

Petitioner asserted that he requested a lawyer and insisted he had not talked to the District Attorney,nor did he make any incriminating statements. Huntley Hearing:Page 68-72.

Rodriguez,declared that he had a record of a prior felony conviction and that he was experienced in these proceedings and that he had a lawyer that he wished to contact,one Selig Lenefsky.

Objections were made to the use of the wiretap since apparently the sole basis for Rodriguez,arrest were wiretaps of Gonzalez'telephone. Huntley Hearing:Page 79-83.

The defense insisted wiretap orders were insufficient and that petitioner was not aware of the existence of them till April I969. Huntley Hearing.Page 84-89.

Petitioner feels that the arrest,search,and wiretap conversation were all illegal and that this was the beginning of the"fruit of the poisoned tree."

THE TRIAL

FRED ARONE, testifying for the prosecution, asserted that he worked for the Sheriffs Department, as an investigator, and together with Louis Rubenfeld of the Sheriffs Office, he maintained a surveillance from about 2:00 A.M. to about 2:I5 A.M. in front of 2I5 North Broadway, Yonkers. He testified that he saw three men enter the lobby, one of whom was Daniel Gonzalez. Another carried a bag. This latter individual was later identified as your petitioner. (There is no evidence that your petitioner was involved in any conspiracy with Gonzalez).

Arone transmitted this information to Chief Investigator Charles Jackson, and to Assistant D.A. Lawrence Martin. At about 2:45 A.M. the witness declared that he and other police officers entered the apartment and arrested petitioner and his wife. They commenced a search, including the bathroom where they found a glassine bag with white powder under a shelf. This was inside a closed cabinet at the time. SEE TRIAL MINUTES: Page I7-2I.

During the search the police also uncovered a Hanson Scale, on a kitchen counter and inside a sofa one of the men found a rolled up dollar bill with traces of white powder on it. This evidence was turned over to Walter Lippmann. TRIAL MINUTES Page 29.

The witness admitted that he never knew what was in the paper bag, he allegedly saw your petitioner carrying. Entrance to the apartment was a passkey, which was secured by the Superintendent. There was no knock on the door and no announcement of authority. TRIAL MINUTES: Page 38-43. No one consented to entry.

Arone conceded further that upon entering the apartment he did not see the paper bag in question and, as a matter of fact, observed no contraband later found. At no time did the Officer see either the petitioner or the codefendant in possession of any contraband. Arone asserted that he merely assumed that the contraband later found was in the constructive possession of both parties.

LOUIS RUBENFELD,testifying for the People, declared that he also was a member of the Sheriffs Office,and participated in the surveilance of 250 North Broadway. He entered the apartment with investigator Turso,and helped arrest the petitioner. It was he whom found the dollar bill stuffed in a chair in the living-room. TRIAL MINUTES:Page 60-63.

At no time did Rubenfeld see any paper bag such as the one that petitioner was alleged to be carrying.

Rocco Turso,a member of the Sheriffs Staff stated on January I4th I969 he was instructed by Assistant D.A. Lawrence Martin,to arrest Rodriguez,for Conspiracy to violate Narcotics Laws. The other detectives were already in the apartment when he arrived. SEE TRIAL MINUTES:Page 77-82.

Turso,acknowledged that he never saw the petitioner committing any crime in his presence. TRIAL MINUTES: Page 83.

Walter Lippmann,of the Sheriffs Department stated that he was attached to the CRIME LABORATORY. Lippmann, declared that he analyzed the white powder which was seized and found that it contained Cocaine. TRIAL MINUTES:Page 95.

In the Grand Jury minutes however,the witness admitted that he had testified that the powder consisted of Heroin. Lippmann,asserted that he made a mistake in the Grand Jury. TRIAL MINUTES:Page II0-I20-I23.

ARGUMENT

-POINT ONE-

THE DEFENDANT PETITIONER RODRIGUEZ RIGHTS UNDER THE FOURTH AND FIFTH AMENDMENTS WERE VIOLATED BY POLICE OFFICERS WHO BURST INTO HIS HOME WITHOUT ANNOUNCEMENT,USING A PASS KEY,IN THE EARLY MORNING,AT WHICH TIME THEY ARRESTED HIM AND HIS WIFE AND CONDUCTED A MASSIVE SEARCH OF HIS APARTMENT,DESPITE THE FACT THAT THEY LACKED EITHER AN ARREST

WARRANT OR A SEARCH WARRANT. AND
THEREFORE ANY EVIDENCE TAKEN FROM
THE APARTMENT WERE POISONED FRUITS.

The petitioner lived at home with his wife and small children. A couple of police officers who had been surveiling the apartment house in which he resided because of an investigation of one Daniel Gonzalez who lived in the same building,in a different apartment,observed your petitioner carrying an ordinary paper bag in the early morning hours of January I4th I969,at 250 North Broadway,Yonkers,New York.

No witness at all for the prosecution testified as to the contents of that bag since it was never a shred of evidence that it contained anything illegal. The bag itself has never been found.

The testimony of the arresting officers indicated that they had obtained a passkey from the superintendent at about 3:00 A.M. in the morning and let themselves into the apartment without announcing their authority or even knocking. Petitioner was attired in only a pair of pants and his wife only in a pair of panties.

No contraband was visable to anyone upon entering the apartment. The police had neither a search warrant,nor an arrest warrant.

IT IS SUBMITTED THAT THEY HAD NO PROBABLE CAUSE TO MAKE AN ARREST AND CERTAINLY NO RIGHT TO CONDUCT A SEARCH.

The police found white powder in a closed cabinet shelf in the bathroom after a search,and a dollar bill rolled up in a cushion in a chair in the living room. The white powder was analyzed by Walter Lippmann,of the Sheriffs Office to contain cocaine although in the Grand Jury he stated that it consisted of heroin. IT IS TO BE NOTED HERE THAT THE POLICE HAD NO PROBABLE CAUSE TO ENTER THE APARTMENT OR TO MAKE AN ARREST. THEY CERTAINLY HAD NO JUSTIFICATION FOR A SEARCH.

In See v City of Seattle,387 U.S. 54I,543 the Supreme Court aptly noted:

"THE BUSINESS MAN,LIKE THE OCCUPANT OF A RESIDENCE,HAS A CONSTITUTIONAL RIGHT TO GO ABOUT HIS BUSINESS FREE FROM UNREASON* ABLE OFFICIAL ENTRIES UPON HIS PRIVATE COMM* ERCIAL PROPERTY."

In Trupiano v United States,334 U.S. 699 705, 708,the court aptly ruled that excusing a search warrant cannot be found merely because of a lawfull arrest.....search warrants are essential irrespective of lawfull arrest,except in the most unusual of circumstances. (Quoted in CHIMEL,395 U.S. at 759).

"A SEARCH OR SEIZURE WITHOUT A WARRANT AS AN INCIDENT TO A LAWFULL ARREST HAS ALWAYS BEEN CONSIDERED TO BE STRICTLY LIMITED RIGHT. IT GROWS OUT OF OF THE INHERENT NECESSITIES OF THE SITUATION AT THE TIME OF THE ARREST. BUT THERE MUST BE SOMETHING MORE IN THE WAY OF NEC- ESSITY THAN MERELY A LAWFULL ARREST."

SEE: Also: United States v Baldwin 46 F.R.D. 63, 65, S.D.N.Y. I969.

In United States v Rabinowitz,supra,as explained in Van Cleef v New Jersey,supra,and Shipley v California,supra,there was never any general authority to conduct indiscriminate searches merely because they were incident to lawfull arrests. THE ARREST HEREIN WAS NOT LAWFULL.

Both defendants,Orlando Rodriguez,and Norma Rodriguez, were the subjects of the search. Since Norma Rodriguez,was acquitted,it does not necessarily follow that the property in question belonged to the petitioner since the the propiety of a search and seizure is a question of law. In any event, as"possessors",constructively or actually,Rodriguez,the petitioner had"standing."

SEE: McDonald v United States,335 U.S. 45I; Jones v United States,362 U.S. 257; Niro v United States,388 F.2 535 537 C.A. Ist I968;United States v Mullin,329 F.2d 295 (C.A.4th I9 64); Contreas v United States,29I F.2d(C.A. 9th I96I);Bourg,v United States 286 F.2d I24 (C.A. 5th I960).

In the case at bar the police admitted that they had absolutely no basis to believe that the paper bag they saw in the hands of petitioner while entering the apartment building,contained contraband. NO ARREST WARRANT OR SEARCH WARRANT HAD BEEN OBTAINED.....which seems to contradict Assistant D.A. Lawrence Martins,statement that RODRIGUEZ,would have been arrested eventually. IF THAT WERE THE CASE....then there was absolutly a necessity to obtain a search warrant and arrest warrant.

In Vale v Louisiana,399 U.S. 30 (1970),the United States Supreme Court cautioned very aptly:

> "Belief,however well founded,that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant."

THIS IS POINTED OUT TO THE COURT THAT THE SEARCH HEREIN WAS BAD FROM SEVERAL POINTS OF VIEW. IN THE FIRST PLACE,THE POLICE HAD NO RIGHT TO ENTER THE PREMISES WITHOUT ANNOUNCING THEIR AUTHORITY(SECTION: 799 CODE OF CRIMINAL PRO).

There is no suggestion that anyone consented to the search (Zap v United States,328 U.S. 624,628). The officers were not responding to an emergency (United States v Jeffers,342 U.S. 48). They were not in hot pursuit of a fleeing felon (Warden v Hayden 387 U.S. 294,298,299;and Chapman v United States,365 U.S.6I0,6I5).

The goods ultimately seized were not in the process of destruction. Schmerber v California 384 U.S. 757,770,77I; McDonald v United States,supra,at 455.

There is no evidence whatsoever that it was impractible for the authorities to have obtained a search warrant or arrest warrant. McDonald v United States ,supra; Trupiano v United States,334 U.S. 699,705,706; Johnson v United States, 333 U.S. IO; Go Bart Importing Co. v United States,282 U.S. 344 358.

WE TURN FOR A MOMENT TO THE ADJUNCT QUESTION OF WHETHER OR NOT THE COURT WAS JUSTIFIED IN PERMITTING THE JURY TO EVEN CONSIDER POSSESSION IN THIS CASE. THE DRUGS WERE FOUND IN A CLOSED CABINET IN THE BATHROOM AND STUFFED IN THE PILLOW OF A CHAIR.

IN A REGENT CASE DECIDED BY THE NEW YORK COURT OF APPEALS, PEOPLE VS SIPLIN, 29N.Y. 2d 84I, the Court threw out that case because the "constructive" possession of narcotics found in the apartment was not sufficiently established. The Court in its memorandum, asserted: "The order appealed from should be reversed and complaint dismissed upon the ground that the guilt of defendant was not established beyond a reasonable doubt, the proof offered in support of an inference of defendants possession of control of the necessary apartment falling far short of the standard necessary to establish his constructive possession of the narcotics paraphernalia found there. SEE; People v Perry, 2 N.Y. 2d 785, I58 N.Y.S. 2d 330, I39 N.E. 2d 427; Peo v Leavitt, 30I N.Y. II3, 92 N.E.2d N.Y.S. 2d 9I5; People v Schriber, 34 A.D. 2d 852, 3I0 N.Y.S. 2d 55I, aff'd 29 N.Y.2d 780, 327 N.Y.S. 2d 68, 277 N.E. 2d I87(decided November I7th I97I); United States v Romano, 382 U.S. I36, 86 S.Ct 279, I5 L.Ed 2d 2I0.

Petitioners Trial Counsel, objected and called the Courts attention to a number of cases, including People v Leavitt 30I N.Y. II3. Also indicating the standard necessary to establish constructive possession. An appropriate exception to the Courts charge was taken because of the fact that there was improper definition of construtive possession. SEE: Trial Minutes Page 274.

The definition of possession set forth in 220.20 of the Penal Law clearly requires that it be knowing and unlawfull. THERE IS NO EVEIDENCE HEREIN THAT YOUR PETITIONER KNEW ABOUT THE DRUGS OR HAD KNOWING POSSESSION.

-POINT TWO-

THE ALLEGED INCRIMINATING STATEMENTS OBTAINED FROM PETITIONER WERE THE PRODUCT OF AN UNLAWFULL SEARCH AND SEIZURE AND ILL* EGAL ARREST AND THUS WERE THE"POISONED FRUITS" OF SUCH UNCONSTITUTIONAL ACT* IVITIES. THE COURT THEREFORE SHOULD HAVE SUPPRESSED THOSE STATEMENTS.

The testimony at the trial indicated and revealed the petitioner was arrested and his home was invaded by several police officers from the Sheriffs Office on January I4th I969,without a search warrant and without an arrest warrant. The only basis for petitioners arrest was because he was seen carrying a ordinary paper bag,the contents which,if any,were certainly unknown to anybody other than the petitioner.

There was clearly no basis for the search and seizure because no probable cause existed. Assistant D.A. Martin, testified that Rodriguez,your petitioner,eventually would have been arrested,which means absolutely nothing.....since there was never an arrest warrant nor a search warrant procured.

As a matter of fact,Martins,statement reinforces petitioners argument that he was prematurely arrested and searched since it is likely if probable cause existed at any time..... it certainly did not exist at the time the search and seizure were executed.

The law required that the District Attorney and the police secure a search warrant before entering Petitioner Rodriguez,home. If they had expected to arrest him,there was certainly time enough to get a warrant to search the home. They succeeded in getting a warrant to search the apartment of Daniel Gonzalez,in the same building. If petitioner Rodriguez,was part and parcel of that arrest,there certainly was time,and it should have been no problem in getting a warrant for petitioners home as well.

Since no warrant was obtained however,and the arrest, search and seizure were violations of the law as well as the CONSTITUTION.

Subsequent to the arrest however,and subsequent to the seizure of certain narcotics from the apartment of petitioner, Rodriguez,was questioned in the precinct. It is undisputed that petitioner had no attorney and,moreover,that he apparently was fluent only in Spanish. Frank Garcia,an investigator, allegedly used for the purpose of translating,died before the Trial and it is submitted that error was committed when the Court allowed the People to use the words of Garcia,a dead man,against petitioner despite the fact that Garcia,was not available as a witness because he was then deceased.

It should be noted that the denial of the right to cross-examination of Garcia,was in itself error requiring reversal because it foreclosed a SIXTH AMENDMENT right of confrontation which of course is essential to the guarantee of DUE PROCESS OF LAW. SEE; Alford v United States, 282 U.S. 267;and Smith v Illinois, 390 U.S. I29,I32.

The petitioner Rodriguez,denied that he in any way made incriminating statements or confession. The Court nevertheless allowed into evidence highly damaging admissions to the effect that petitioner acknowledged that the drugs were his and not his wifes and that he in fact was working with Gonzales.

The use of the confession however,or damaging admissions,was,in any event,error because it was the fruit of an unlawfull search and seizure since without the search and seizure of narcotics,Petitioner would never have been put in a position of having to subject himself to interrogation. THUS THE CONFESSION AND ADMISSIONS SHOULD HAVE BEEN SUPPRESSED IN THE HUNTLEY HEARING. People v Rodriguez,II N.Y. 2d 279;and People v Robinson, I3 N.Y.2d 296.

-POINT THREE-

THE COURT DID NOT SUFFICIENTLY CHARGE ON THE ISSUES IN THE CASE ESPECIALLY ON THE THEORY OF CONSTRUCTIVE POSSESSION. MOREOVER, PETITIONER WAS DENIED THE RIGHT OF CONFRONTATION UNDER THE SIXTH AMENDMENT BECAUSE STATEMENTS OF THE DECEASED INVESTIGATOR GARCIA WERE ADMITTED AGAINST HIM OVER THE OBJECTION OF TRIAL COUNSEL.

As has already been noted, supra, an exception was taken to a number of portions of the charge including the fact that the Court did not properly instruct the jury on the requirements of constructive possession. Petitioner has already called this Courts attention to several cases under POINT ONE involving constructive possession indicating that far more than is shown herein was required to convict the petitioner. The drugs in question were found in the home supposedly occupied by petitioner, his wife, and children. The acquital of Norma Rodrigues, petitioners wife, does not necessarily mean that the jury found against the petitioner on the issue of possession of the drugs as such since the jury was improperly instructed along those lines.

SECTION 220.20 of the PENAL LAW requires that the People prove that the drug in question was "knowingly and unlawfully" possessed. The charge of the Court, however, would be appropriate perhaps where physical possession had been the case. In this litigation however, there is no evidence that petitioner ever physically possessed any drugs. In a bathroom and a dollar bill with traces of cocaine was found in a cushion of a chair are, of and in themselves, no evidence of possession but, at the most constructive possession.

Constructive possession is not automatically presumed. For example, in Section 220.25 there is a presumption with respect to drugs found in an automobile. There is no automatic presumption with respect to drugs found in an apartment.

Since there was never any pysical possession of the drugs in question,the jurors should have been told that this was a circumstance which was equally susceptible to an inference of guilt or an inference to innocence and,consequently,that they should have been acquitted. In other words, circumstantial evidence is insufficient to convict unless it excludes to a moral certainty every hypothesis except that of guilt.

In view of the foregoing,the judgement of conviction should also be reversed.

It was previously mentioned that investigator Frank Garcia,was an important individual in the historical events leading up to the indictment since it was he who apparently told the District Attorney Martin that petitioner Rodriguez,wanted to talk to him and it was also Garcia,who allegedly translated the conversations between Martin and petitioner Rodriguez.

The very able trial attorney,Mr.Lanna,thoroughly protected the record and moved for a mistrial as well as objecting when the Court permitted the prosecutor to quote what Garcia,had said. This conversation between the prosecutor and Garcia,which was very prejudicial to petitioner Rodriguez, could not be made the subject of cross-examination since the investigator Garcia,was dead.

THUS A SIXTH AMENDMENT RIGHT OF CONFRONTATION WAS DENIED. ALFORD V UNITED STATES,SUPRA;SMITH V ILLINOIS SUPRA;AND SIXTH AMENDMENT,UNITED STATES CONSTITUTION.

-POINT FOUR-

INVESTIGATOR WALTER LIPPMANN THE LABORATORY ANALYST,ADMITTED THAT HE TOLD THE GRAND JURY THAT THE DRUGS SEIZED CONSISTED OF HEROIN AND NOT COCAINE. THIS WAS A FATAL DEFECT SINCE THERE IS NO DOUBT THAT THE DRUG SEIZED WAS COCAINE.

Investigator Walter Lippmann,who analyzed the drug that was seized,testified at the trial that the drug in question was cocaine. He acknowledged that when he had appeared before the Grand Jury he had informed that body that the drug consisted of HEROIN.

While the Trial Court sought to ameliorate this discrepancy by referring to an offhand statement that cocaine was also found on a dollar bill. Trial Minutes:Page 228 There is no evidence at all that the witness was referring to cocaine when he mentioned heroin in his testimony concerning the much larger amount of drugs found in the bathroom.

If the cocaine found on the dollar bill was the only evidence admissable,then there could not have been a conviction for possession in the First Degree,but possession in the Fourth Degree,would have been the most that could be justified,even assuming possession could be established in the first place.

Since a GRAND JURY INDICTMENT must be precise to [illegible] against double jeopardy,this error was fundamental. Russ[illegible] v United States, 369 U.S. 749,763,764 (1962).

In view of the foregoing,therefore,it is submitted that there was fatal variance in the proof submitted to the Grand Jury and that fact,too,would seem to require a reversal of the judgement of conviction.

-CONCLUSION-

Wherefore a Hearing should be had to determine the issues herein the foregoing application. At the ending of the abovementioned Hearing a Writ of Habeus Corpus,issue forth,stating that petitioners rights as a citizen of the United States,were violated because he was denied Due Process of Law,and further that his rights under the Sixth Amendment to the Constitution were violated,and in particular petitioners rights secured under the Fourteenth Amendment of the United States.

Petitioner prays this Honorable Court for relief and for any further relief as justice may require.

DATED: ULSTER COUNTY NEW YORK.
MARCH 19 I973.

Respectfully submitted,

Orlando Rodriguez

Orlando Rodriguez I0337 Pro-se
P.O.Box G
Wallkill New York I2589.

Sworn to before me this
19th day of March I973.

Leis A Stamatedes
NOTARY PUBLIC

LEIS A. STAMATEDES
Notary Public, State of New York
Qualified in Ulster County
Commission Expires March 30, 19 75

STATE OF NEW YORK)
ULSTER COUNTY) SS.:

Orlando Rodriguez, being duly sworn deposes and says: That he is the petitioner in the foregoing application and knows the contents thereof, that the same is true to his own knowledge, except as to those matters he believes them to be true.

DATED: ULSTER COUNTY NEW YORK.
MARCH 19 I973.

Respectfully submitted,

Orlando Rodriguez

Orlando Rodriguez I0337 Pro-se
P.O.Box G
Wallkill New York I2589.

Sworn to before me this
19th day of March I973.

Leis A Stamatedes
NOTARY PUBLIC

[illegible] 75

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT NEW YORK

UNITED STATES OF AMERICA EX REL. ORLANDO RODRIGUEZ PETITIONER	X	AFFIDAVIT IN SUPPORT OF APPLICAT* ION FOR A WRIT OF HA* BEUS CORPUS.
AGAINST	X	
HON. HAROLD BUTLER, SUPERINTENDENT OF WALLKILL CORRECTIONAL FACILITY RESPONDENT	X	EXHIBIT-B
	X	

STATE OF NEW YORK)
ULSTER COUNTY) SS.:

ORLANDO RODRIGUEZ, being duly sworn deposes and says: That he is the petitioner named in the motion and petition submitted to this Honorable Court, and that he makes this AFFIDAVIT IN SUPPORT, to be used as an Exhibit, to support his allegations made in the motion, and petition, submitted to the Court.

THAT: On or about January 14th 1969, petitioners home was broken into without a SEARCH WARRANT, and both he and his wife were beaten, and pulled from their bed, where petitioners wife(whom incidently was recovering from a cancer operation)was made to stand half nude, while a search of petitioners apartment was made by the Sheriffs Department, along with Assistant District Martin, of the Westchester County District Attorneys Office.

When I complained of this trespass, I was hit in the face and head by a Deputy Sheriff, and told to keep my lip buttoned or else i'd get more of the same. My wife was crying, but no consideration was given her.....she was forced to stand with her breast bared, and in panties. No ARREST WARRANT, was served upon petitioner, or his wife, whom is now deceased due to the treatment she suffered at the hands of the Westchester County Sheriffs Department, in so that the Sheriffs Department, refused to give my wife medication for a period of over one full week, thus the CANCER GERMS, overtook her body, as she was denied her medication and left to suffer, so that she would confess.

My wife Norma Rodriguez, was my codefendant, in this case. She was acquitted. I actually feel that the Sheriffs Department, murdered my wife.....due to the fact that she was denied the medication deliberatly, for reasons to force her to testify against me, and confess to a crime she had nothing to do with. No mercy was shown her. Even though my wife was in excruciating pain and pleaded for help, she was denied the needed medication.

On February Ist I972,my wife died of Cancer,due to the abusive measures used against her by the Sheriffs Department. I write all this to show this Court,the fashion which was used to procure a conviction,and just how far people will go to get said conviction. No Search Warrant,or Arrest Warrant,was used to enter my premises(apartment),on or about January I4th I969. It can be plainly seen that petitioner did not open the door and offer anyone to enter. The entrance was against my will.

A deliberate lie was told to the Grand Jury,when Walter Lippmann,a Labratory Analyst,stated under oath,that the drug found in the apartment was HEROIN,not Cocaine. SEE: GRAND JURY MINUTES FOR VERIFICATION. Then when he took the Witness Stand,Mr.Lippmann,stated under oath,that the drug found in the apartment was Cocaine. Very inconsistent for an expert witness to testify in this fashion. How could he have made such an error? This is stated to show the Court,how I was set up. The Newburgh Police Department,used this method to frame numerous men,along with the N.Y.C.Police Department.

This seems to be the police departments common pratice. I am a victim of such practice. The Sheriffs Department,is no different from other law-enforcement agencies,therefore they did make the switch,or in reality,there was no drug to begin with. They couldn't make up their mind which one to plant in the apartment. Thus I am imprisoned for a period of I5 years, for a crime which I did not commit. And I lost my wife,because of the brutal methods applied by the Westchester County Sheriff.

DATED: Ulster County New York.
March 19 I973.

Very respectfully,

Orlando Rodriguez

Orlando Rodriguez I0337
P.O.Box G
Wallkill New York I2589.

Sworn to before me
this 19th day of March I973.

Luis A Stamatides
NOTARY PUBLIC

[illegible] 95

State of New York
Court of Appeals

BEFORE: HON CHARLES D BREITEL, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK
Respondent,

against

ORLANDO RODRIGUEZ,
Defendant-Appellant.

CERTIFICATE
DENYING
LEAVE

I, CHARLES D. BREITEL, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied

Dated Albany, New York
November 2, 1972

Charles D. Breitel
Associate Judge

Irving Anolik, Esq.
225 Broadway
New York, New York

Hon. Carl A. Vergari
District Attorney, Westchester Co.
Court House
White Plains, New York

Clerk, Court of Appeals

*Briefs returned herewith

*Description of Order:
10-18-72 App. Div. 2d, affirmed 7-20-720 Co. Ct., Westchester Co.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT NEW YORK

UNITED STATES OF AMERICA EX REL. ORLANDO RODRIGUEZ PETITIONER *AGAINST* HON. HAROLD BUTLER, SUPERINTENDENT OF WALLKILL CORRECTIONAL FACILITY. RESPONDENT	#_____ MOTION: Application for a writ of Habeus Corpus. Pursuant to: 28 U.S.C. 2254

STATE OF NEW YORK)
ULSTER COUNTY) SS.:
SIRS:

PLEASE TAKE NOTICE: That the undersigned will move this Honorable Court, on the ___ day of April 1973, at 10:00 A.M. in the forenoon, at a Motions Part, of the United States District Court, Southern District New York, at the U.S. Courthouse, Foley Square, New York City, New York, for a writ in the nature of a WRIT OF HABEUS CORPUS.

PLEASE TAKE FURTHER NOTICE: That your petitioner will attach affidavits, a petition, and other pertinent data, in support of this motion. Your petitioner is an innocent man, and not guilty of the crime for which he was convicted, and he is being held against his will.

Petitioner seeks an evidentiary hearing to determine the issues stated herein, and after said hearing, a writ of habeus corpus, issue forth.

DATED: Ulster County New York.
March 19 1973.

Respectfully submitted,

Orlando Rodriguez

Orlando Rodriguez 10337 Pro-se
P.O.Box G
Wallkill New York 12589.

Sworn to before me this
19th day of March 1973.

Lois B Hernandez
NOTARY PUBLIC

[illegible] York
[illegible] 30, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT NEW YORK

UNITED STATES OF AMERICA EX REL
ORLANDO RODRIGUEZ PETITIONER X

AGAINST X

HON. HAROLD BUTLER, SUPERINTENDENT OF
WALLKILL CORRECTIONAL FACILITY. X
RESPONDENT

X

MOTION: Application to proceed in Forma Pauperis. 28 U.S.C. 1915 A

STATE OF NEW YORK)
ULSTER COUNTY) SS.:

ORLANDO RODRIGUEZ, being duly sworn deposes and says: That I am without funds to pay for the proceedings in the U.S.District Court, as I am an indigent person, whom owns no property, and has no bank account, therefore I cannot afford an attorney, due to the fact that all my funds have been exhausted, and therefore petitioner seeks the assistance of counsel, to be assigned by this Honorable Court.

This instant action has merit, is not frivolous, and raises constitutional questions.

Wherefore it is respectfully prayed that the Court, will assign counsel, and allow petitioner to proceed in forma pauperis.

DATED: Ulster County New York.
March 19 1973.

Respectfully submitted,

Orlando Rodriguez

Orlando Rodriguez 10337 Pro-se
P.O.Box G
Wallkill New York 12589.

Sworn to before me this 19th day of March 1973.

Leo P Stamatides
NOTARY PUBLIC

[illegible] New York
[illegible] 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT NEW YORK

UNITED STATES OF AMERICA EX REL
ORLANDO RODRIGUEZ PETITIONER X

AGAINST X

HAROLD BUTLER,SUPERINTENDENT,WALLKILL X PROOF OF SERVICE
CORRECTIONAL FACILITY X

RESPONDENT X

STATE OF NEW YORK)
ULSTER COUNTY) SS.:

ORLANDO RODRIGUEZ,being duly sworn deposes and says: That I am the petitioner in the above entitled action, and that on the ___day of March I973,four(4)copies of application for a writ of habeus corpus were placed in the hands of the mail-clerks at The Wallkill Correctional Facility,to be mailed via U.S.Postal Service. Three(3)copies to the U.S.Court Clerk,and one (I)copy to the N.Y.State Attorney Generals Office,80 Centre Stree t,New York City New York.

Dated: Ulster County New York.
March 9 I973.

Respectfully submitted,

Orlando Rodriguez

Orlando Rodriguez I0337 Pro-se
P.O.Box G
Wallkill New York I2589.

Sworn to before me this
19th day of March I973.

Luis A Stamatides
NOTARY PUBLIC

975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel. ORLANDO RODRIGUEZ PETITIONER -AGAINST- HON.HAROLD BUTLER,SUPERINTENDENT, WALLKILL CORR.FACILITY,WALLKILL NEW YORK, RESPONDENT	REPLY: TO N.Y. STATE ATTORNEY GENERALS OPPOSITION. 73 CIV 1207

STATE OF NEW YORK)
ULSTER COUNTY) SS.:

ORLANDO RODRIGUEZ,being duly sworn deposes and says: That I am the abovenamed petitioner in this entitled action,and that this reply is in answer to the New York State Attorney Generals,opposition,to petitioners application for a Writ of Habeus Corpus,in the U.S.District Court,Southern District New York.

I. Petitioner Rodriguez,restates and realleges all previous statements made in the original application to this Honorable Court.

2. Petitioner challenges the validity of the opposition submitted by the N.Y.Attorney Generals Office. (SEE: Exhibit A). Petitioner moves this Court,to declare null and void the opposition submitted by the said N.Y.State Attorney Generals Office. REASON SET FORTH:

3. Time Limit,designated by this Honorable Court after extending the time limit past the usual twenty day(20) answering limit,was ignored by the N.Y.Attorney Generals Office. A date was set by this Honorable Court,by command,that the day of May 3rd,1973,was the last day the Attorney General,had for placing an opposition into the U.S.District Courts Clerk,hands. The exhibit A,will show that the U.S.District Court Clerk,did not receive the opposition to file till May 7th 1973. A period of four (4) days late. THEREFORE,this Court,should rule against the oppositiom being placed into legal opposition to your petitioners application for a writ of habeus corpus. This Court,did grant the N.Y.Attorney General,further time to file the opposition.....May 3rd 1973,was the last day for the Attorney General to file,legally,according to the Court,mandate.

4. The New York Attorney Generals Office, should be taken to task for their tardy behavior, and penalized, due to the contempt shown the U.S.District Courts, mandate. Petitioner knows that if he were late in any way.....it would be held against him. Therefore in all fairness, the opposition should be stricken from the record, as being over a deadline, is the same as to acquiesce, as to what was written in the original application.

5. The Attorney Generals Opposition, is in itself erroneous, lacks in truth, and at areas actually contradicts the record, to deceive this honorable court. Another reason it should be ignored.

6. Defects in opposition: A. Late in submitting same. B. The attorney general states that the police had prior knowledge of the events of the evening that the arrest and seizure took place(page two), therefore there should have been plenty of time to obtain a search warrant and arrest warrant. C. The attorney general openly admits that warrants were obtained for everyone else.....then why wasn't one obtained for this petitioner??? Wiretap, is openly admitted by the attorney general, but the truth of the matter is that your petitioner had no telephone.....nor is there a fire-escape, in which petitioner was stated to be running to other apartments....as petitioners apartment had no fire-escape. On page 6 of the opposition, the attorney general states that an arrest may be made without a warrant if there is probable cause to arrest, and that a search may be legally made thereafter.....YET, none of the arresting Officers, stated that they seen, or had seen, petitioner in the commission of a crime.....and that police officers were on the same elevator, and on the same floor, when petitioner got off the elevator and entered his apartment, with the mysterious brown bag that really contained a quart of milk, and a loaf of bread, not drugs.....yet no arrest was made. The record clearly states no crime was seen by any police officers, or the District Attorney, whom was present with them.

7. THE OPPOSITION OPENLY ADMITS THAT NO SEARCH, OR ARREST WARRANT, WAS OBTAINED FOR THE ARREST OF PETITIONER, OR FOR THE SEARCH OF HIS APARTMENT.

8. If the police officers present,along with the District Attorney of Westchester County,believed a felony had or was in progress,they should have apprehended the suspects as soon as they entered the premises of 250 North Broadway,Yonkers New York,and not waited till petitioner was in bed with his wife asleep.....then come barging through the doors without announcing whom they were,and pulling petitioner from his bed along with his wife(whom incidently was acquitted of this crime)and force them to stand and be forcefully searched while the wife stood with naked breast begging for cover,and was beaten about the head because she complained of her nakedness.

9. Petitioners wife was forced to suffer in pain, so that she would confess to the Westchester County District Attorney. Medication was withheld from my wife whom at the time was dying of CANCER. No matter how she would cry out....no relief would be given her. Petitioners wife is now deceased.

IO. Petitioner realizes it is the Attorney Generals job,to oppose applications submitted to this and other Courts. Yet rules are layed down for both sides.... these rules must be obeyed to the letter,or otherwise we would have chaos in the Courts. When a petitioner does not obey the rules....it is held against him. When the Attorney General,does not obey the rules.....it should also be held against him. Or otherwise the Court,would show gross impassive treatment toward petitioner to allow the Attorney General,to submit late,without excuse, as though the Attorney General,was a privileged character,and did not have to answer for his errors,and be subjected to punishment for same.

II. The Court,should take notice,that the Attorney General,did not controvert,petitioners charge of brutality toward petitioners wife,and the conduct of the raiding party,of the early morning hours of January I4th I969.

I2. To try to cover up for the Westchester County District Attorney,in his not obtaining Search or Arrest Warrants for the arrest and search of petitioner and his apartment is sheer audacity on the part of the Attorney General,as it is admitted on page two,very clearly.....that warrants were obtained for everyone else,but your petitioner....it is clearly admitted that the police and D.A. had prior knowledge of this matter.

If this were true.....and warrants were obtained for the others involved.....then there is no excuse why one was not obtained for your petitioner. On page two,the Attorney General,states that the police were armed with warrants for APARTMENTS.....CARS.....AND PERSONS. YET NONE WAS OBTAINED FOR YOUR PETITIONER. (VERY ODD). As also on page two of the opposition,it is clearly written that the police had prior knowledge of everything that was to take place that evening. So states the Attorney General. THEREFORE,petitioner complains of illegal search and seizure,by the police and the Westchester County District Attorneys Office,in violation of his constitutional rights,thus making this present conviction illegally obtained in violation of petitioners constitutional rights.

Conclusion

Petitioner requests further time to elaborate if the Opposition,prepared by the New York State Attorney Generals Office,is accepted by this Honorable Court,as petitioner feels the opposition being late should be disregarded,because the mandate of the U.S.District Court,was not complied with.

Petitioner further requests that if this Honorable Court,rules,the opposition submitted by the New York State Attorney General,is allowed to be entered in opposition to petitioners application,and no further time is granted petitioner,to elaborate and cite further cases,then cases cited in the original application should be noted by this Court.

Wherefore,it is prayed by your petitioner,that the conviction obtained through illegal methods in violation of petitioners constitutional and civil rights,be declared null and void by this Honorable Court,and set aside,due to said illegally violations of law and that the conviction should be reversed. And that the opposition submitted by the Attorney Generals Office,be set aside,as illegal,due to the reason that the opposition submitted by the New York State Attorney General, was not timely made. And further that no excuse was given for the late submittal,therefore the opposition should not be made part of the record. Exhibit A (ATTACHED).

Petitioner prays for relief from this Honorable Court, on the points of law submitted in the original application, and constitutional violations cited therein. This Honorable Court, should rule on the illegal procedures used in obtaining the conviction against your petitioners constitutional and civil rights.

Petitioner prays this Honorable Court to reverse the conviction.

DATED: ULSTER COUNTY NEW YORK
MAY 15th I973.

Respectfully submitted,

Orlando Rodriguez

ORLANDO RODRIGUEZ I0337
P.O.Box F
Wallkill New York I2589.

Sworn to before me this
15th day of May I973.

Lois A Stamatedes
NOTARY PUBLIC

LOIS A. STAMATEDES
Notary Public, State of New York
Residing in Ulster County
Commission Expires March 30, 1975

STATE OF NEW YORK)
ULSTER COUNTY) SS.:

ORLANDO RODRIGUEZ, being duly sworn deposes and says: That he is the petitioner abovenamed, that he has read the foregoing petition in reply, and knows the contents thereof; that the same is true to his own knowledge except as to those matters stated therein to be alleged on information and belief, and to those matters he believes them to be true.

Orlando Rodriguez

ORLANDO RODRIGUEZ I0337
P.O.Box F Wallkill N.Y. I2589

Sworn to before me
this 15th day of May I973.

Lois A Stamatedes
NOTARY PUBLIC

LOIS A. STAMATEDES
Notary Public, State of New York
Residing in Ulster County
Commission Expires March 30, 1975

Exhibit (A)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK
OFFICE OF THE CLERK
U. S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N. Y. 10007

May 7, 1973

Mr. Orlando Rodriguez
#10337
P.O. Box G
Wallkill, New York 12589

Re: Pro Se 73 Civ. 1207

Dear Sir:

Please be advised that respondent's answer in the above-numbered action has been received in the Pro Se Clerk's office and was filed with the Court on May 7, 1973.

Should you wish to submit a reply to such answer, you have 20 days from the above-shown filing date in which to serve a copy of your papers upon respondent's attorney, and file the original with the Court.

Very truly yours,

THOMAS E. ANDREWS,
Clerk, U.S.D.C.
Sou.Dist.of N.Y.

Ronald Sulyma

By: Ronald Sulyma
Deputy Pro Se Clerk

29A

COUNTY COURT
WESTCHESTER COUNTY

---X

THE PEOPLE OF THE STATE OF NEW YORK

-against-

ORLANDO RODRIGUEZ and NORMA RODRIGUEZ,

Defendants.

Indictment No.
39-69
DA # 39-69

---X

S I R :

PLEASE TAKE NOTICE, that upon the annexed affidavit of ORLANDO RODRIGUEZ, sworn to the 29th day of December, 1969, the Indictment, and upon all of the proceedings heretofore had herein, the undersigned will move this Court at a regular term, to be held in and for the County of Westchester at the County Courthouse, 166 Main Street, White Plains, New York on the 9th day of January, 1970 at 9:30 o'clock in the forenoon or as soon thereafter as counsel can be heard for an Order suppressing any and all evidence seized at the time the above named defendant was arrested and restraining the District Attorney of the County of Westchester and/or the Police Department of the City of Yonkers from using any of the aforesaid evidence upon the trial or any information directly or indirectly obtained therefrom, or by means thereof, on the grounds that said evidence was seized without a valid search warrant, warrant of arrest, without consent and without probable cause, prior to the arrest of the above named defendant and after an exploratory search, in clear violation of the Constitutional Rights of the said defendants under the provisions of the Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States and in violation of a State Constitutional Right as well as in violation of the applicable provisions of the Code of Criminal Procedure of the State of New York and for such other and further relief as the Court may deem just and proper.

Dated: Yonkers, New York
December 29th, 1969

TO: CARL A. VERGARI
District Attorney
Westchester County

[illegible], COPPOLA & ROSATO
Attorneys for Defendants
80 Riverdale Avenue
Yonkers, New York
VINCENT J. [illegible], of counsel

COUNTY COURT
WESTCHESTER COUNTY

----------X

THE PEOPLE OF THE STATE OF NEW YORK

-against-

Indictment No.
39-69
DA #39-69

ORLANDO RODRIGUEZ and NORMA RODRIGUEZ,

Defendants.

----------X

STATE OF NEW YORK]
] ss.:
COUNTY OF WESTCHESTER]

I, ORLANDO RODRIGUEZ, being duly sworn, deposes and says:

1. That on the 14th day of January, 1969, while I was lawfully within my apartment No. 2G located at 250 North Broadway in the City of Yonkers, County of Westchester and State of New York, along with my wife, the co-defendant herein, NORMA RODRIGUEZ, police officers entered the said apartment, and searched both our persons and the apartment without benefit of our consent and also placed us under arrest.

2. That at the time of the incident, we were not shown a search warrant nor a warrant of arrest nor anything that resembled alegal paper in connection therewith.

3. That we were searched personally and the apartment in which we were residing was searched without being asked permission and we were also informed that we were being placed under arrest for allegedly having narcotics in our possession.

4. That as stated hereinbefore, all of the foregoing was done without the benefit of a search warrant or warrant for my arrest for no legal documents were exhibited to me and upon the information that my attorney, VINCENT W. LANNA, ESQ., has given me that although he has requested on several occasions that a search warrant or a warrant for my arrest on the date of this incident be exhibited to him none has been shown to him all of which I verily believe and as a result it is the opinion of both myself and my attorney that none has been procured.

WHEREFORE, your deponent prays for an Order excluding and suppressing any and all evidence upon the trial of the above

action and further, that the District Attorney of Westchester County and/or the Police Department of the City of Yonkers be restrained from using any evidence upon any subsequent trial obtained as a result of the aforesaid unlawful search and seizure and/or any information directly or indirectly obtained therefrom by means thereof, on the grounds that the same were obtained and seized in violation of the applicable provisions of the Constitution of the State of New York, the Constitution of the United States and the Code of Criminal Procedure of the State of New York.

ORLANDO RODRIGUEZ

Sworn to before me this
29th day of December, 1969

71

COUNTY COURT: WESTCHESTER COUNTY

----------x

THE PEOPLE OF THE STATE OF NEW YORK

- against -

ORLANDO RODRIGUEZ AND NORMA RODRIGUEZ,

Defendants.

----------x

AFFIDAVIT IN OPPOSITION

IND. #39/69
INDEX #39/69

STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)

JANET CUNARD, being duly sworn, deposes and says:

That she is an Assistant District Attorney of Westchester County and submits this Affidavit In Opposition to the defendants' motion which seeks an order of this Court suppressing certain evidence. This Affidavit is made on information and belief, the source of which is the file of this matter maintained by the District Attorney.

By Indictment #39/69, the defendants were charged with the crime of CRIMINAL POSSESSION OF A DANGEROUS DRUG IN THE FIRST DEGREE.

The search and seizure in question was made as an incident to a lawful arrest. As there is an issue of fact as to whether or not there was probable cause to make an arrest, the People will consent to a hearing immediately prior to trial limited to the issue of whether or not the officers had probable cause to make the arrest in question.

It is respectfully submitted that there has been no other issue raised and that the motion should be granted to the extent of a limited hearing on the issue of

whether or not the officers had probable cause to arrest and that the motion should be in all other respects denied.

WHEREFORE, your deponent prays the instant motion be denied except insofar as above consented.

/s/ JANET GUNARD
Assistant District Attorney

Sworn to before me this
3rd day of January, 1970

HELEN J. D'ANDREA
Notary Public, State of New York
No. 61-[illegible]
Qualified in Westchester County
Term expires March 30, 19[illegible]

COUNTY COURT : COUNTY OF WESTCHESTER

THE PEOPLE OF THE STATE OF NEW YORK

-against- IND. #39/69

ORLANDO RODRIGUEZ and
NORMA RODRIGUEZ,

Defendants.

BURCHELL, J.

The motion to suppress is granted on consent of the District Attorney to the extent that a hearing will be held immediately prior to trial to determine the legality of the arrests of defendants. The hearing shall also encompass the scope of the search made pursuant to the arrests. (Chimel v. California, 395 US 752)

The aforesaid constitutes the decision and order on the motion.

The District Attorney is directed to serve a copy of this decision and order, with notice of entry, upon defendant's counsel.

Dated: White Plains, N. Y.
January 26, 1970

/s/ George D. Burchell
GEORGE D. BURCHELL
County Court Judge

HON. CARL A. VERGARI
District Attorney of Westchester County
County Courthouse
White Plains, N. Y.

[illegible], COPPOLA & ROCATO, ESQ.
Attorneys for Defendants
50 Riverdale Avenue
Yonkers, New York

At a Criminal Term of the County Court of Westchester County, held in the Courthouse, in the City of White Plains, New York, on the 27th day of February, 1970.

PRESENT:

HON. GEORGE D. BURCHELL
County Judge of Westchester County

THE PEOPLE OF THE STATE OF NEW YORK

- against -

ORLANDO RODRIGUEZ and NORMA RODRIGUEZ,

Defendants.

ORDER TO SHOW CAUSE

Indictment No. 39/69
Index No. 39 69

Upon reading the annexed affidavit of JANET CUNARD, Assistant District Attorney of Westchester County, duly sworn to the 27th day of February, 1970, and upon all the prior pleadings and proceedings heretofore had thereon,

LET the defendants show cause at a Criminal Term of this Court, to be held on the 4th day of March, 1970, at the Courthouse located in the City of White Plains, New York, at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel may be heard, why an order should not be made and entered granting permission to reargue an order of this Court dated January 26, 1970, and upon reargument limiting the hearing ordered to whether or not there was probable cause for an arrest of the defendants.

Sufficient cause appearing, let the service of this order and the affidavit annexed thereto upon the attorney for the defendants on or before Feb. 27, 1970 by mail be deemed sufficient.

/s/ George D. Burchell

County Judge of Westchester County

COUNTY COURT : WESTCHESTER COUNTY

THE PEOPLE OF THE STATE OF NEW YORK

- against -

ORLANDO RODRIGUEZ and NORMA RODRIGUEZ,

Defendants.

AFFIDAVIT

Indictment No. 39/69
Index No. 39/69

STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)

JANET CUNARO, being duly sworn, deposes and says:

That she is an Assistant District Attorney of Westchester County and submits this affidavit in support of the People's application for an order granting permission to reargue an order of this Court dated January 26, 1970 which, upon the consent of the District Attorney, granted a hearing immediately prior to trial to determine the legality of the arrests of the defendants encompassing the scope of the search made pursuant to the arrests on the authority of Chimel v. California, 395 U.S. 752 and upon reargument limiting the scope of the hearing to whether or not there was probable cause for arrest of the defendants. This affidavit is made on infomation and belief, the source of which is the file or this matter maintained by the District Attorney.

By notice of motion dated December 29, 1969, the defendants moved this Court for an order suppressing any evidence seized from the defendants. In an affidavit dated January 13, 1970, the District Attorney consented to a hearing

as to the legality of the seizure described in the defendants' moving papers insofar as whether or not there was probable cause to make an arrest prior to the search and seizure in question. By order of the Court dated January 26, 1970, the motion to suppress was granted upon the consent of the District Attorney to the extent that a hearing will be held immediately prior to trial to determine the legality of the arrests of the defendants. The order further called for the hearing to encompass the scope of the search pursuant to the authority of Chimel v. California. It is respectfully submitted that the moving papers raise no issue as to the scope of the search and therefore there should be no hearing under the authority of Chimel v. California. A hearing on a motion to suppress should only be granted as to issues of fact raised in the moving papers.

Assuming arguendo that the moving papers raised a Chimel issue, there would still be no reason to determine that issue on the hearing. The search in question occurred on January 14, 1969 and Chimel was decided on June 23, 1969. As the search inquestion occurred prior to Chimel and Chimel is to be given only prospective application, that issue would not be properly included in this case. (U. S. v. Wild, _____ F2d _____ 2Cir, N.Y.L.J. December 1, 1969, p. 1; U.S. v. Bennett, 2 Cir., 415 F2 1113; People v. Lewis, 33 A.D. 2d 193).

The hearing directed by the Court, upon the consent of the District Attorney and pursuant to the request of the defendants should be limited to the issue of whether or not

there was probable cause for the arrest of the defendants and therefore a lawful search and seizure incident to that arrest.

There has been no prior application made to this Court or any other Court or any Judge thereof for the relief requested herein.

WHEREFORE, your deponent prays the instant application be in all respects granted.

/s/ Janet Cunard

Assistant District Attorney

Sworn to before me this
27th day of February, 1970.

SALLY K. deVRIES
NOTARY [illegible]
Qualified in Westchester County
Term Expires March 30, 19[illegible]

COUNTY COURT : COUNTY OF WESTCHESTER

THE PEOPLE OF THE STATE OF NEW YORK

-against- IND. #39/69

ORLANDO RODRIGUEZ and
NORMA RODRIGUEZ,
Defendants.

BURCHELL, J.

Motion by the People for reargument is granted. It appears that this Court in its original holding dated January 26, 1970, required the hearing to encompass the scope of the search under the authority of Chimel v. California (395 US 752). The search of defendant's premises occurred on January 14, 1969. Chimel, which was decided on June 23, 1969, is prospective only and may not be given retroactive effect. (see People v. Lewis 33 AD 2d 193)

Accordingly, upon reargument, the Court amends its original decision and limits the hearing to be held herein to the question of whether or not there was probable cause for an arrest of defendants.

The aforesaid constitutes the decision and order on the motion.

The District Attorney is directed to serve a copy of this decision and order with notice of entry, upon defendant's counsel.

Dated: White Plains, N. Y.
March 9, 1970

/s/ George D. Burchell
George D. Burchell
County Court Judge

HON. CARL A. VERGARI
District Attorney of Westchester County
County Courthouse
White Plains, N. Y. 10601

[illegible], ESQ. Attorney for Defendants
[illegible] Avenue
[illegible] New York 10701

40

COUNTY COURT : COUNTY OF WESTCHESTER

THE PEOPLE OF THE STATE OF NEW YORK

-against- Indictment #39/69

ORLANDO RODRIGUEZ and NORMA RODRIGUEZ,

Defendants.

76/449

BEISHEIM, J.

The undersigned held a suppression hearing in connection with the motion of the defendants herein pursuant to order of Hon. George D. Burchell, one of the Judges of this Court, dated March 9, 1970. Judge Burchell directed the hearing for the limited purpose "of whether or not there was probable cause for an arrest of defendants".

The sole witness at the hearing was Lawrence N. Martin, Jr., who was an Assistant District Attorney for Westchester County at the time that the defendants were arrested on January 14, 1969, and who was the Assistant District Attorney then in charge of the investigation of the activities of a certain alleged drug ring of which at least the defendant, Orlando Rodriguez, was allegedly a part.

Mr. Martin testified that on the evening of January 13, 1969, he was present at or outside of an apartment house known as 250 North Broadway, Yonkers, New York, and directed certain police officers accompanying him to make inquiry of the superintendent of the apartment house as to what the superintendent knew about a man named Gonzalez. The superintendent reported to Martin and the police officers that he knew that Gonzalez was associated with the defendant, Orlando Rodriguez, and that he had seen Rodriguez travel between Rodriguez' apartment and Gonzalez' apartment by means of a fire escape leading to one or other of the apartments.

Martin testified that in the early morning of January 14th he and the police officers had entered Gonzalez' apartment pursuant to a search warrant and, while they were in that apartment, received a message over a walkie-talkie radio which they had with them from other investigating officers that Gonzalez was entering the building. Martin testified that he had previously learned through wiretap evidence that Gonzalez and two companions had picked up a package of narcotics earlier in the evening but that the message he received had listed only the name of Gonzalez and not the names of the other two men. Martin testified further that Gonzalez and another man entered Gonzalez' apartment and were placed under arrest. However, no package of narcotics was found on either of them.

Martin averred further that a subsequent radio report over the walkie-talkie, received from another investigating officer, informed him that the third man who had been with Gonzalez had been followed to Rodriguez' apartment on the second floor of the apartment house and had been observed to have been carrying a package.

Martin stated further that he met an investigating officer named Garcia at another apartment at 250 North Broadway (i.e., an apartment other than the apartment of Rodriguez or the apartment of Gonzalez) searching a whole group of defendants who had been arrested in connection with the investigation of this particular drug ring. Garcia told Martin that he, Garcia, had intercepted telephone conversations between members of the alleged drug ring in which it had been revealed that Rodriguez and Gonzalez were couriers for other definitely named members of the ring and that in fact Rodriguez and Gonzalez had been arrested a few days earlier in the State of New Jersey on narcotics charges. Upon receiving all of this information, Martin stated that he

directed representatives of the Westchester County Sheriff's Office to place Rodriguez under arrest and that Rodriguez was arrested in his apartment, at which time no one else was present except the defendant, Norma Rodriguez, the wife of the defendant, Orlando Rodriguez, and that as an incident to arrest the contraband which defendants seek to suppress was seized in Rodriguez' apartment. After the contraband narcotics were seized, the defendant, Norma Rodriguez, was placed under arrest, which arrest had not previously been directed by Martin but was made by the Sheriff's Office only after the narcotics were found to be in the apartment leased by defendants, Orlando Rodriguez and Norma Rodriguez. The earlier arrest of Orlando Rodriguez was upon the original charge of conspiracy to sell a narcotic drug.

On the basis of the foregoing testimony, the Court finds that there was probable cause for the initial arrrest of the defendant, Orlando Rodriguez, and, upon the seizure of the narcotics in the apartment of the defendants, Orlando Rodriguez and Norma Rodriguez, when they were both present, there was probable cause for the subsequent arrest of Norma Rodriguez.

Defendants cite the case of Chimel v. California, 395 US 752, in support of their contention that the narcotics seized in this case should be suppressed. The Chimel case, supra, is inapplicable to the case at bar since the search herein was made prior to June 23, 1969. United States v. Ravich, et al, U. S. Court of Appeals for the Second Circuit, decided February 6, 1970.

The aforesaid constitutes the decision and order on the motion.

The District Attorney is directed to serve a copy of

this decision and order, with notice of entry, upon defendants' counsel.

Dated: White Plains, N.Y.
April 15, 1970

/s/ George Beisheim, Jr.
GEORGE BEISHEIM, JR.
County Court Judge

HON. CARL A. VERGARI
District Attorney of Westchester County
Courthouse
White Plains, N.Y. 10601

VINCENT W. LANNIA, ESQ.
Attorney for Defendants
50 Riverdale Avenue
Yonkers, N.Y. 10701

AFFIDAVIT OF SERVICE

COUNTY OF WESTCHESTER)
) ss.:
STATE OF NEW YORK)

..... being duly sworn, deposes and says ... day of ..... 19..., ... within ..... upon

VINCENT W. LANNIA, ESQ.,

by ... closing a true copy thereof in a securely sealed postpaid wrapper addressed ... said attorney at ... Riverdale Avenue, Yonkers, N.Y. 10701 ... depositing same in a Post Office Box regularly maintained by the United States ... enclosed, at the County Court House, in the City of White Plains, N. Y.

... sworn further says that the said ... is the ... attorney for the defendant herein and ... writing from the box ... would be likely ... this notice is ... Yonkers, N.Y.

Deponent is over the ... of 18 years.

Sworn to before me this ... day of ...

...

14

Copy

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES ex rel. ORLANDO RODRIGUEZ,

Petitioner,

-v-

73 CIV. 1207

HAROLD BUTLER, Superintendent, Wallkill Correctional Facility, Wallkill, New York,

#43126
~~#34426~~

Respondent.

APPEARANCES:

JESSE BERMAN
351 Broadway
New York, New York 10013

Attorney for Petitioner

LOUIS J. LEFKOWITZ
Attorney General
State of New York
Two World Trade Center
New York, New York 10047

Attorney for Respondent

CONSTANCE BAKER MOTLEY, D. J.

Petitioner, Orlando Rodriguez, a prisoner in Wallkill Correctional Facility, seeks a writ of habeas corpus to review a judgment of conviction rendered in County Court, Westchester County (Hon. George Beisheim, Jr.). He was convicted after trial by a jury of possession of a dangerous drug (cocaine) in the first degree. (N. Y. Penal Law § 220.20 (McKinney, 1967), and was sentenced on July 20, 1970 to an indeterminate term of imprisonment not to exceed five years. The judgment was unanimously affirmed by the Appellate Division, Second Department, 40 A.D.2d 763 (1972), and leave to appeal to the New York Court of Appeals was denied on November 2, 1972.

The court finds that Rodriguez' judgment of conviction was a product of an unannounced entry into his apartment by police officers in violation of the Fourth Amendment, made applicable to the states by the Fourteenth Amendment. The petition is therefore granted.

Petitioner seeks relief on the following grounds: 1) that a confession admitted into evidence on his trial was obtained in violation of Miranda v. Arizona, 384 U. S. 436

(1966); 2) that statements made by a police officer were admitted as evidence against him in violation of his Sixth Amendment right of confrontation; 3) that the trial court improperly charged the jury on the elements of his offense; 4) that his indictment was not supported by adequate evidence; 5) that his arrest was without probable cause; 6) that the search of his apartment was unconstitutional since the police officers lacked a warrant; and 7) that the failure of the police to announce themselves before entering his apartment rendered the subsequent arrest and search illegal.

FINDINGS OF FACT

Prior to January 13, 1969 an investigation was conducted into a narcotics conspiracy alleged to be centered in the City of Yonkers, New York. On the evening of January 13, 1969 Assistant District Attorney Lawrence Martin of the Westchester County District Attorney's Office, accompanied by investigators from the Westchester County Sheriff's Office and police officers from the Yonkers and New York City Police Departments, proceeded to the area of 250 North Broadway, Yonkers to execute

search warrants for certain apartments, automobiles and persons (petitioner Rodriguez was not among them). One of the search warrants directed a search of the apartment and person of Daniel Gonzalez. Martin directed certain officers to talk to the superintendent of the building (where petitioner also maintained an apartment) about Gonzalez. The superintendent told the officers that he had seen Gonzalez and Rodriguez together on many occasions and that he had seen Rodriguez travel between his apartment and the Gonzalez apartment by means of the fire escape. That same evening, over a wiretap of Gonzalez' phone, the officers heard conversations indicating that Gonzalez and others had gone to pick up a shipment of narcotics. During the early morning hours of January 14, investigators from the Sheriff's Office maintained a surveillance of the building where Gonzalez and Rodriguez lived.

While conducting this surveillance, the officers saw three men, Gonzalez, Rodriguez and another, enter the building. Rodriguez was seen carrying a paper bag. As the three men entered the building, an investigator from the Sheriff's Office joined them in the elevator. Rodriguez got

off at the second floor, followed by the investigator. The investigator then observed Rodriguez enter his apartment. The other two suspects continued on to the third floor Gonzalez apartment, where Martin was waiting. They were immediately arrested and searched, but no contraband was found. Martin then directed the police to go to petitioner's apartment and to arrest him.

The officers entered petitioner's apartment, without first knocking or announcing their authority, by means of a pass key obtained from the superintendent. Upon entering the apartment, the officers saw petitioner and his wife whom they immediately arrested. Incident to the arrests, the officers conducted a search of the apartment, finding 10.5 ounces of cocaine, a weighing scale, and a rolled-up dollar bill with traces of white powder on it. All of these items were admitted against petitioner on trial.

After the warrantless arrests and discovery of narcotics, petitioner and his wife were brought to the Yonkers Police headquarters where petitioner, fluent only in Spanish, spoke with Martin through Investigator Frank Garcia serving as interpreter. Martin, in both English and

in Spanish through Garcia, advised petitioner of his right to remain silent and his right to an attorney. Rodriguez then told Martin that the narcotics were cocaine; that they were his and Gonzalez', and that he was "cutting" it for Gonzalez. Garcia died before trial. Over petitioner's objection, these statements were admitted against him on trial.

Exhaustion

At the outset, the court notes that whenever a federal court is asked to review a state court judgment of conviction, the federal-state relationship is subject to considerable stress. Accordingly, the habeas corpus statute, 28 U.S.C. § 2254(b), commands a federal district court to stay its hand where adequate and available state remedies remain unexhausted. A sense of comity and due regard for state jurisdiction demand that the state prisoner who attacks the validity of the judgment of conviction pursuant to which he is incarcerated must first give the state courts an opportunity to correct any federal violations. Fay v. Noia, 372 U. S. 391, 418 (1963). Once petitioner's

claims have been presented to the state courts, however, it is not necessary to present them again by an alternate means. Under Brown v. Allen, 344 U. S. 443, 447 (1953), the landmark case enunciating a broadened federal review of state convictions, the exhaustion of state remedies requirement is satisfied when "the same evidence and issues already decided by direct review" in the state courts are presented in the federal habeas corpus petition.

The court finds from the record that petitioner has met the exhaustion requirement in that in the state proceedings, each issue now before the court was properly raised and considered. Respondent's claim that petitioner did not sufficiently raise the issue of the unannounced police entrance is without merit. As articulated in Picard v. Connor, 404 U. S. 270, 276 (1971), the test is whether the state court had "a fair opportunity" to consider the alleged constitutional defect. As petitioner points out,[1/] this very issue was raised before the Appellate Division in both petitioner's and respondent's briefs,[2/] giving the state adequate opportunity to review petitioner's claim.

Sufficiency of Miranda Warnings

Turning to the merits of petitioner's claims, the court finds that Rodriguez' confession was not obtained in violation of Miranda v. Arizona, supra. Petitioner was given a full and effective warning of his rights before he made any incriminating statements to Garcia and Martin. Indeed, the procedure utilized made it clear that petitioner understood his rights to counsel and to remain silent, as well as the fact that any statements he did make could be used against him on trial. These warnings were given in both English and in Spanish.

Martin directed Rodriguez to read warnings printed on the walls of the Yonkers Police Headquarters. Having read them, Rodriguez explained that he understood. In addition, Rodriguez was given an oral warning in English by Martin and an oral warning in Spanish, responding to both that he understood. The requirement of Miranda, that an accused have "a full opportunity to exercise the privilege against self-incrimination [by being] adequately and effectively apprised of his rights", 384 U. S. at 467, was thus fully met. The court notes at this juncture that the

mere giving of the Miranda warnings does not dissipate the effect of an arrest which, as here, is otherwise illegal. Brown v. Illinois, ___ U. S. ___ (June 26, 1975), 43 U.S.L.W. 4937 (June 26, 1975).

Right of Confrontation

Petitioner urges that statements made by Investigator Garcia of the Westchester County Sheriff's Office, as testified to by Martin, be excluded on Sixth Amendment grounds, because Garcia died prior to trial and was not, therefore, available for cross-examination. Indeed, an examination of the transcript of the Huntley hearing does not disclose any statements by Garcia which were admitted for the truth of the matters asserted. Therefore, the court cannot find that cross-examination of Garcia would have been necessary to protect petitioner's rights.

Petitioner also objects to the recounting of certain statements of Garcia during the course of Martin's testimony on the trial. In accordance with New York practice, the question of the voluntariness of petitioner's confession was left to the jury, even though the court had already determined that the confession was voluntary.

People v. Huntley, 15 N.Y.2d 72, 204 N.E.2d 179 (1965).

Martin testified that investigator Garcia had informed him during the course of questioning, that petitioner had told him (Garcia) that he had not been threatened by police officers. This hearsay statement was received for the truth of the matter asserted, that is, that Rodriguez had stated that he had not been coerced.

It is arguable that petitioner's constitutional rights were not affected by the admission of the hearsay evidence since New York is not required by the Federal Constitution to provide for a jury determination as to voluntariness once the court has found the confession to be voluntary. Jackson v. Denno, 378 U. S. 368 (1964).

The court assumes that once a state decides that an issue should be decided by a jury, it must conduct its proceedings in accordance with pertinent constitutional requirements, including those of the confrontation clause.

Nevertheless, any error in receiving the hearsay evidence was harmless. There was testimony on the trial that petitioner was warned of his rights under Miranda and that he waived those rights. Therefore, the court concludes that, even without the hearsay evidence, the jury

would have found that the confession was voluntary.

Court's Instructions to the Jury

Petitioner claims that the trial judge erroneously charged the jury on the issue of constructive possession on the ground that the instruction was "somewhat confusing and obscure" (Trial Tr. at 274), because it inadequately explained the elements of constructive possession. The court finds, however, that any error, if there were any, is harmless. Habeas corpus does not lie to set aside a conviction on the basis of improper jury instructions unless the impropriety is a clear denial of due process so as to render the trial fundamentally unfair. Higgins v. Wainwright, 424 F.2d 177 (5th Cir. 1970); Schiers v. California, 333 F.2d 173 (9th Cir. 1964). Finding no such impropriety in the jury instruction, the alleged error would not be of a constitutional magnitude sufficient to grant habeas corpus relief.

Sufficiency of Evidence to Sustain Indictment

Petitioner argues that because a laboratory technician told the grand jury that the package seized from petitioner's apartment contained heroin (see Trial Tr., June 24, 1970, pp. 109-10) the indictment, which charged him with possession of cocaine, violated his Fifth Amendment right to prosecution by grand jury in that there was insufficient evidence to sustain this indictment. The court finds, however, that the indictment at issue is legally sufficient. It is settled law that "[a]n indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial on the merits." Costello v. United States, 350 U. S. 361, 363 (1956); see also United States v. Ricciardi, 357 F.2d 91, 98 (2d Cir.), cert. denied, 384 U. S. 942 (1966).

The claim is accordingly rejected.

Probable Cause

Probable cause to make an arrest exists "if the

facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed." Henry v. United States, 361 U. S. 98, 102 (1959).

The state trial court could reasonably conclude that there was probable cause for the arrest based on the following facts developed at the pre-trial suppression hearing:

1) Lawrence Martin of the Westchester County District Attorney's Office, who directed Rodriguez' arrest on January 14, 1969, testified that officers had been told by the superintendent of Rodriguez' apartment house that Rodriguez had been seen with Gonzalez;

2) it had been learned over wiretaps that Gonzalez and several others had gone to pick up a shipment of narcotics that day;

3) police officers entered Gonzalez' apartment on the morning of January 14, 1969;

4) while the officers were inside Gonzalez' apartment, Gonzalez and another man entered the

apartment. Neither was found to have narcotics in his possession;

5) Martin received a report from another officer that the officer had followed a third man to an apartment which was in the name of Orlando Rodriguez and this man was seen carrying a package;

6) Martin testified that he had been told by Investigator Garcia that Rodriguez and Gonzalez had been arrested only a few days earlier in New Jersey while transporting narcotics.

From all of the above, the arresting officers could reasonably conclude that Rodriguez and the others had picked up a shipment of narcotics; that, since Gonzalez and the other man did not have the narcotics on their persons, the third man seen entering Rodriguez' apartment, Rodriguez, was carrying a package of narcotics.

Warrantless Search

Petitioner claims that certain tangible evidence should not have been received on the trial since it was seized during the course of a warrantless search. The arresting officers seized 10.5 ounces of cocaine contained in a glassine envelope found in Rodriguez' bathroom cabinet. The officers also seized a rolled up dollar bill found secreted in a living room chair. The bill contained particles of white powder later determined to be cocaine. Finally the officers seized a small weighing scale.

A warrantless search is justified if it is incident to a lawful arrest. United States v. Rabinowitz, 339 U. S. 56, 60 (1950); Weeks v. United States, 232 U. S. 383, 392 (1914). Since the search occurred on January 14, 1969, prior to June 29, 1969, the date on which Chimel v. California, 395 U. S. 752 (1969), was decided, pre-Chimel standards govern this case. Williams v. United States, 401 U. S. 646 (1971).

Because a search of the apartment incident to the arrest must be judged by pre-Chimel standards, the court finds that a search warrant was not required. See Ker v. California, 374 U. S. 23, 42 (1963) (plurality opinion).

Entry By Police Officers of Petitioner's Apartment Without Prior Announcement.

As previously described, the arresting officers gained entry to the Rodriguez apartment by use of a passkey obtained from the superintendent of the apartment house. In entering the apartment, the officers did not knock prior to using the key, nor did they announce their identity or purpose in seeking entrance. Rather, the officers simply acquired the passkey and proceeded immediately to petitioner's apartment, unlocked the door, and entered, catching Rodriguez and his wife completely by surpise. Indeed, petitioner and his wife were only partially clothed when the officers came in.

The Supreme Court has held that the Fourth Amendment incorporates the common law rule of announcement as an essential element of a legal entry. Ker v. California, 374 U. S. 23, 37, 47 (1963).

A proper and sufficient announcement should obviously include a statement by police that they were law enforcement officers and that they were entering to make an arrest or to execute a search warrant. The exact extent of the announcement need not be decided here, however,

since, in this case, there was no announcement at all.

The requirement of a prior announcement serves important purposes. The fundamental teaching of the Fourth Amendment is that intrusions upon persons' legitimate, reasonable expectations of privacy should be limited to cases in which the intrusions are justified by important needs and only to the extent necessary to achieve those purposes. See, e.g., Chimel v. California, supra; Terry v. Ohio, 392 U. S. 1 (1968).

An unannounced entry of an individual's dwelling place by police officers is a significantly broader intrusion upon the occupant's expectation of privacy than an entry preceded by an announcement. A prior announcement affords the individual an opportunity to dress and to cease acts which, although not criminal, might be embarrasing to the individual if observed by others. Moreoever, "[t]he areas in which a person can feel free from unexpected intrusion are few indeed. Thus, police announcement of their presence, identity and purpose in execution of a search or arrest provides a basis for belief that one need not fear an unexpected incursion; this psychological security is arguably as important as a few minutes notice

to an inhabitant during which he can dress or unlock the door." Note, Announcement in Police Entries, 80 Yale L.J. 139, 153 (1970).

Finally, prior announcements will minimize the anxiety to the occupant resulting from a sudden entry and the danger of violence both to the occupant and the police. The right of privacy secured by the Fourth Amendment protects the public's interest in preventing the violence which can result when individuals are disturbed without explanation in their homes.

The court regards the rule of announcement to be as essential to protection of the individual against unreasonable searches and seizures as the requirement that searches be made pursuant to warrants, a requirement which is dispensed with only is exceptional situations. Since the Fourth Amendment prohibits both searches and seizures which are not justified by probable cause and searches and seizures which are unnecessarily intrusive, the rule of announcement, like the search warrant requirement, should be dispensed with only in exceptional situations. Only in cases where the public interest is sufficiently compelling to outweigh the individual's privacy interest can exceptions to the announcement rule be justified.

62

In Ker v. California, supra, four members of the Supreme Court held that an entry without prior announcement was justified in view of the police officers' belief that Ker was in possession of narcotics, "which could be quickly and easily destroyed" and by Ker's furtive conduct, which was a ground for belief that he might well have been expecting the police. 374 U. S. at 40.

In the present case, the state claims that there were exigent circumstances present sufficient for a departure from the announcement requirement. The state argues that police paddy wagons which were enroute to the apartment house might have arrived at any moment, alerting petitioner to the police presence. The court cannot agree. An announcement would have only taken a few moments, and the paddy wagons could have been delayed briefly by radio communication.

The other exigent circumstances which the state claims justified an unannounced entry are:

1) that petitioner was a known carrier of narcotics;

2) that police officers heard wiretap conversations that Gonzalez and others had gone that same evening to pick up a narcotics shipment;

3) that petitioner was seen returning to the building carrying a package and accompanied by Gonzalez and another man;

4) that petitioner was seen entering his own apartment carrying the package; and

5) that Gonzalez and his companion did not possess any narcotics when they were searched by police officers who entered their apartment. That these are circumstances which justify departure from the announcement requirement the court cannot agree. Rather, these conditions are all relevant only to probable cause for the arrest, not to whether a "no knock" entry was proper.

Thus, the only possible exceptional circumstance in this case was that narcotics were involved, raising the question of whether the mere fact that narcotics or other destructible evidence are involved presents an exceptional situation which justifies a departure from the announcement requirement. The court concludes that more must be shown

than the fact that destructible evidence may be involved in order to warrant an exception to the rule requiring announcement before entry. United States v. Likas, 448 F.2d 607 (7th Cir. 1971); see, United States v. Wiley, 462 F.2d 1178 (D. C. Cir. 1972).

In many cases, even where the occupants might attempt to destroy the evidence if they were given notice of an impending arrest, a prior announcement would not result in destruction of the evidence. The time saved by the absence of a prior announcement would rarely be more than a minute. In cases involving large quantities of narcotics, where the public interest in apprehending suspects and seizing evidence is greatest, destruction of all the narcotics evidence as well as less readily disposable narcotics paraphernalia in the time taken by an announcement is likely to be impossible. See Note, Announcement in Police Entries, 80 Yale L. J. 139, 166.

The court further notes that Congress has not authorized "no knock" entries in cases where the only basis for believing evidence would be destroyed is the nature of the evidence involved. Title 8, U. S. C. § 3109, applicable to federal prosecutions, provides that officers

may break open any door or window of a house to execute a search warrant "if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant."

Section 509(b) of the 1970 Drug Abuse Prevention and Control Act, 21 U. S. C. § 879(b), authorizes "no knock" entries if a United States magistrate:

> "(1) is satisfied that there is probable cause to believe that (A) the property sought may and, if such notice is given, will be easily and quickly destroyed or disposed of. . . . "

The legislative history of this statute indicates that "it is not enough just to show that the particular substance which is being sought is of such nature that it could be easily destroyed, although that is one element." 116 Cong. Rec. 1319 (1970). 3/

Thus, Congress apparently concluded that the need for unannounced entries does not outweigh the individual's interest in privacy merely because narcotics are involved.

The court, therefore, cannot conclude that, on the facts of this case, there were sufficiently compelling circumstances present to justify the police officers' unannounced entry into Rodriguez' apartment. Accordingly, the Fourth Amendment requires that the tangible evidence seized from petitioner's apartment should have been suppressed.[4/] Terry v. Ohio, 392 U. S. 1 (1968); Linkletter v. Walker, 381 U. S. 618 (1965); Mapp v. Ohio, 367 U. S. 643 (19161). Petitioner is not entitled to relief, however, if the erroneous receipt of the cocaine was harmless beyond a reasonable doubt in view of the other evidence received on the trial.

Apart from the evidence seized in petitioner's apartment, the state's case on the trial consisted primarily of a confession in which petitioner acknowledged that the cocaine belonged to him.

However, the confession, by itself, without production of the cocaine in evidence would not have supported a finding by the jury beyond a reasonable doubt that petitioner possessed 10.5 ounces of cocaine. While there was also testimony as to the amount of the cocaine involved, such testimony would amount to the kind of use of the

tangible evidence which the exclusionary rule forbids. Wong Sun v. United States, 371 U. S. 471, 485 (1963). Although petitioner has not attacked this testimony on Wong Sun grounds, such a challenge was unnecessary since a conclusion that the tangible evidence should be suppressed would almost certainly have resulted in a ruling that testimony about the illegally seized evidence should also be excluded. The court, therefore, need not decide whether the confession was tainted by the illegal entry into petitioner's apartment.

The petition of habeas corpus is hereby granted. Petitioner is ordered released from custody unless the state within 60 days from the date of the entry of this court's order retries him. A stay will be granted if respondent files a notice of appeal in timely fashion.

Dated: New York, New York
September 23, 1975

CONSTANCE BAKER MOTLEY
U. S. D. J.

FOOTNOTES

1. Petitioner's Supplemental Memorandum of Law, at 1.

2. Brief for Defendant-Appellant, at 15-16, 23-24; Appellate Division Brief for Respondent, at 6-7.

3. It is less clear whether the D. C. Criminal Procedure Act, D. C. Code Ann. §§ 23-522(c)(2), 23-591(c)(2), authorizes "no knock" entries on a mere showing that narcotics are involved.

A number of states, including New York, apparently authorize "no knock" entries based on a showing that readily disposable evidence is involved. See, e.g., People v. DeLago, 16 N.Y.2d 289, 213 N.E.2d 659, 266 N.Y.S.2d 353 (1965), cert. denied, 383 U.S. 963 (1966).

4. The court need not determine under what circumstances a prior authorization by a judicial officer would be required for an unannounced entry.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA ex rel. ORLANDO RODRIGUEZ,

Petitioner,

-against-

HAROLD BUTLER, Superintendent, Wallkill Correctional Facility, Wallkill, New York,

Respondent.

NOTICE OF APPEAL

73 Civ. 1207

----------X

S I R S :

PLEASE TAKE NOTICE that respondent, HAROLD BUTLER, Superintendent of Wallkill Correctional Facility, hereby appeals to the United States Court of Appeals for the Second Circuit from an order of this Court, entered September 25, 1975, vacating petitioner's judgment of conviction and releasing him from custody unless the State, within 60 days from the date of entry of the Court's order, retries him, and from each and every part of said order.

Dated: New York, New York
October 14, 1975

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent
By

LILLIAN Z. COHEN
Assistant Attorney General
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. 488-6044

TO: CLERK
United States District Court
Southern District of New York
Foley Square
New York, New York 10007

JESSE BERMAN, ESQ.
351 Broadway
New York, New York 10013

Sir:

Please take notice that the within is a true copy of a
this day duly entered herein in the office of the Clerk of

Dated, N.Y., ,19

Yours, etc.,
LOUIS J. LEFKOWITZ,
Attorney General,

Attorney For

Office And Post Office Address
Capitol, Albany, N.Y. 12224
New York Office
TWO WORLD TRADE CENTER, NEW YORK, N.Y. 10047

To ,Esq.

Attorney for

Sir:--

Please take notice that the within

will be presented for settlement and signature herein to the Hon.
one of the judges of the within named Court, at

in the Borough of
City of New York, on the day of
19 , at M.

Dated, N.Y., ,19

Yours, etc.,
LOUIS J. LEFKOWITZ,
Attorney General,

Attorney For

Office And Post Office Address
Capitol, Albany, N.Y. 12224
New York Office
TWO WORLD TRADE CENTER, NEW YORK, N.Y. 10047

To ,Esq.

Attorney for

---

73 Civ. 1207

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel. ORLANDO RODRIGUEZ,

Petitioner,

-against-

HAROLD BUTLER, Superintendent, Wallkill Correctional Facility, Wallkill, New York,

Respondent.

NOTICE OF APPEAL

LOUIS J. LEFKOWITZ,
Attorney General

Attorney for Respondent

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